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No. 88-351

In The

Supreme Court of the United States

October Term, 1988

RICHARD DRINKWATER,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Metropolitan Life Insurance Company, respectfully requests that this Court deny the petition for writ of *certiorari,* seeking review of the First Circuit's judgment in this case. The First Circuit's opinion is reported at 846 F.2d 821 (1988).

STATEMENT OF THE CASE

Petitioner worked as an insurance salesman for respondent for over thirty years. (A3).[1] On October 12, 1975, he suffered a heart attack. (A3). Beginning the following week, respondent paid petitioner temporary disability insurance benefits under an employee benefit plan, governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (A2, A3). Petitioner's disability persisted, and effective October 1, 1976, respondent commenced payment of permanent disability benefits to petitioner, in accordance with plan terms. (A4).

Respondent introduced a new and more generous permanent disability plan, effective January 1, 1976. (A4). Petitioner claims he was informed that he would be eligible for the higher benefits available under the new plan. (A4). When respondent placed petitioner on permanent disability, petitioner received benefits under the old plan. (A4). At no time, during the six-year period that petitioner received permanent disability benefits under the old plan did he contest the amount of benefits respondent paid to him. (A4-A5).

In July of 1982, petitioner was examined by a physician and a psychiatrist at respondent's request. (A5). The physician found "no objective data to corroborate" petitioner's statements that he had been diagnosed as having heart disease. (A5). The psychiatrist concluded that

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[1]All "A" references are to the Appendix of the Petition for a Writ of Certiorari. The judgment of the Court of Appeals, omitted from the Appendix of the Petition, appears as the Appendix to this Brief.

petitioner should not be ordered to return to work, without first checking with his cardiologist, that the stress of being an insurance salesman was beyond his capacity, and that petitioner should receive a vocational evaluation to determine what other sorts of work, if any, he was capable of performing. (A6).

By letter dated April 8, 1983, respondent advised petitioner that his disability status had been reevaluated. (A6). Petitioner was told that "independent medical examiners failed to find objective evidence" of his disability and that his disability benefits would not be continued beyond April 30, 1983. (A6). The letter concluded with a "suggestion" that petitioner contact respondent "to discuss • • • future plans and employment status." (A6).

On April 25, 1983, petitioner called respondent and was told that he could send information to refute respondent's determination that he was no longer eligible for disability benefits. (A7). Petitioner supplied no additional information to respondent and did not request a review of respondent's determination to discontinue disability benefits after April 30, 1983. (A7). Petitioner contends, however, that he was orally advised by unspecified employees of respondent that "if he did not return to work on May 2, 1983, as directed, • • • he would be fired • • • with total forfeiture of all retirement, health, and other employee benefits." (A7). In fact, long before the date on which petitioner claims the alleged oral statement was made, his retirement benefits had vested and could

not be forfeited, regardless of whether petitioner returned to work on May 2.[2]

Petitioner returned to work on May 2, 1983, and suffered a second heart attack on that same day. (A7). Respondent immediately restored petitioner's disability benefits under the old plan, on the ground that petitioner's second heart attack was a continuation of a preexisting condition under the terms of the plan. (A8). Effective October 1, 1985, petitioner elected early retirement and is currently receiving uncontested retirement benefits from respondent. (A8).

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[2]Although the Court of Appeals made no reference to this specific fact, respondent's affidavit, stating that petitioner's retirement benefit had fully vested as of May 1, 1983, was unrebutted below. Moreover, ERISA itself contains "Minimum Vesting Standards" which required that petitioner's retirement benefits vest as a matter of law prior to May 1, 1983. ERISA § 203(a).

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Court Previously Determined that Causes of Action Brought by ERISA Plan Participants Seeking Damages for Emotional Distress and Punitive Damages "Conflict[] With" the Substantive Provisions of § 502(a) of ERISA and that There Is a "Stark Absence" of Any Support in the Legislative History and Statute for Such Remedies; the Important Question Raised by Petitioner Has Therefore Previously Been Settled.

A. Overview.

Petitioner wrongly maintains that this Court has never settled the important question of whether the judiciary, on behalf of plan participants or beneficiaries, should imply remedies for emotional distress or punitive damages under ERISA's comprehensive, exclusive remedial scheme. Petition for Writ of Certiorari ("Petition") at 29. Petitioner asks this Court to imply such remedies based on an alleged breach of fiduciary duty under § 404(a) of ERISA and alleged interference with protected rights under § 510.[3] According to petitioner, such remedies should be implied under § 502(a)(3)(B) of ERISA, which permits plan participants to obtain "other appropriate equitable relief * * * to redress" any act or practice which violates an ERISA provision. Although petitioner fails to state precisely what makes the ques-

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[3]Petitioner maintains that his claim for compensatory damages "should be assessed proportionately between respondent as *fiduciary* and as *employer*, according to the proportion of its conduct in each capacity caused [*sic*] the injury suffered by petitioner." Petition at 24. Petitioner maintains that his claim for punitive damages is against respondent as "employer" only. *Id.*

tions he raises important, petitioner appears to assert two rationales:

(1) This Court, in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (hereinafter "*Russell*"), "expressly reserved the question of whether the *employee benefit plan* could recover extracontractual damages [citation omitted] and also reserved the question of 'whether any other provision of ERISA authorizes recovery of extracontractual damages' [citation omitted]." Petition at 16 (emphasis in original).

(2) The decisions of this Court in *Russell, Pilot Life Ins. Co. v. Dedeaux*, — U.S. —, 107 S. Ct. 1549 (1987) (hereinafter "*Pilot Life*"), and *Metropolitan Life Ins. Co. v. Taylor*, — U.S. —, 107 S. Ct. 1542 (1987) (hereinafter "*Taylor*"), indicate "it was the legislative intent of Congress and consistent with the statutory structure that the equitable relief authorized by § [502 of ERISA] should include similar remedies [*i.e.*, compensatory and punitive damages] as those implied by the federal courts under [§ 301 of] the [Labor-Management Relations Act of 1947 ('LMRA')]." Petition at 17, 19.

The Petition should be denied. The question expressly left open by *Russell*—whether a plan participant or beneficiary[4] has a private-right of action for compensatory or punitive damages under § 502(a)(3) of ERISA—was necessarily settled by this Court in its unanimous decision in *Pilot Life*. In *Pilot Life*, this Court found that state

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[4]Throughout the remainder of this brief, only the rights of a plan "participant" are mentioned, although it is understood that a plan "beneficiary" may have the same rights. See ERISA § 502(a)(1), (2), (3) and (4).

common-law causes of action for emotional distress and punitive damages—which, but for their state common-law origin, are identical to those alleged by petitioner—"conflicted with" the substantive rights afforded by § 502(a) of ERISA *as a whole*. 107 S. Ct. at 1558. The common-law remedies of damages for emotional distress or punitive damages could only have *"conflicted"* with § 502(a) if § 502(a) failed to authorize such remedies under any of its provisions, including § 502(a)(3)(B), upon which petitioner relies. This Court therefore necessarily found in *Pilot Life* that the substantive rights enforceable by a plan participant under § 502(a) do *not* include a private right of action for compensatory or punitive damages.

Petitioner's argument that this Court, in *Russell*, *Pilot Life* and *Taylor*, found legislative history and support in the statutory structure of ERISA for the proposition that compensatory and punitive damages allegedly permitted under § 301(a) of the LMRA should be "implied" in ERISA actions shows a serious misreading of those decisions. Indeed, this Court could not have been more explicit in *Russell* when it stated that "there is a stark absence—in the [ERISA] statute itself and in its legislative history—of *any* reference to an intention to authorize the recovery of extra-contractual damages." *Russell*, 473 U.S. at 148 (emphasis added).

Finally, although petitioner maintains that he seeks punitive damages against respondent only as "employer," petitioner seeks apportioned compensatory damages against respondent as "fiduciary," based on an alleged violation of § 404(a). Petition at 20, 24. Section 404(a) falls within Part 4 of ERISA, entitled "Fiduciary Re-

sponsibility." *Russell* indicates that the various parts of ERISA should be viewed as internally complete and that remedies provided by one part, such as Part 4, are restrictions upon the scope of remedial relief available for violations found within that part. 473 U.S. at 143.[5] Part 4 provides a remedy for breach of fiduciary duty under § 409(a), enforceable through § 502(a)(2). Petitioner is therefore limited to the § 409(a) remedy, insofar as he seeks damages for breach of fiduciary duty. *See id.* This Court expressly held in *Russell* that "Congress did not provide, and did not intend the judiciary to imply, a cause of action [available to plan participants] for extra-contractual damages" under § 409(a). 473 U.S. at 148. To the extent that petitioner, a plan participant, seeks an award of compensatory damages against respondent for an alleged violation of § 404(a), this Court has previously held that such damages are unavailable. *Id.* Because the Court thoroughly analyzed § 409(a) in *Russell*, it will not be further discussed in this brief.

B. Pilot Life, Building on the Court's Decision in Russell, Necessarily Settled the Important Question Petitioner Raises: Damages for Emotional Distress and Punitive Damages Are Not Available to Plan Participants under any Provision of § 502(a).

This Court found, in *Pilot Life*, that state common-law causes of action for awards of compensatory or pun-

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[5] *But see Russell*, 473 U.S. at 151 (concurring opinion) (indicating that the duties of claims administrators outlined by Part 5 of ERISA should not be restricted so as to exclude fiduciary duties outlined by Part 4).

itive damages to plan participants "conflicted with" the substantive provisions of § 502(a). 107 S. Ct. at 1558. That finding followed in a straight line from the Court's decision in *Russell.* In *Russell,* the Court held that plan participants have no private right of action for compensatory or punitive damages under § 409(a), which is enforceable by plan participants pursuant to § 502(a)(2). Significantly, the concurring opinion in *Russell* emphasized that the Court did not decide, on that occasion, whether extra-contractual compensatory or punitive damages were available to plan participants under § 502(a)(3) of ERISA, on which petitioner relies. The concurring opinion recommended, however, that "courts should * * * consider whether allowance of such relief would significantly *conflict* with some other aspect of the ERISA scheme" when confronting the question in the future. *Russell,* 473 U.S. at 158 (emphasis added). The question and the conflict were expressly confronted and answered in *Pilot Life,* when the Court found that a plan participant's claims for emotional distress and punitive damages "conflicted with" § 502(a) as a whole. Such remedies could not have "conflicted with" § 502(a) if § 502(a) authorized them. This Court therefore necessarily decided, in *Pilot Life,* that neither compensatory nor punitive damages are available to plan participants under any provision of § 502(a), including § 502(a)(3)(B).

Additional findings of the Court in *Russell,* later emphasized by the Court in *Pilot Life,* also show that the question petitioner raises has been settled. In reaching its conclusion in *Russell* that no private-right of action for compensatory or punitive damages exists under § 409(a), the Court relied on "the four-factor analysis used by the

Court in *Cort v. Ash,*" 422 U.S. 66, 78 (1975), for determining if "a private right of action for extra-contractual damages should be implied even if it is not expressly authorized by ERISA." *Russell,* 473 U.S. at 145. The Court found that absence of two of the necessary *Cort v. Ash* factors—"legislative intent and consistency with the legislative scheme"—led to the conclusion that no private right of action for extra-contractual damages exists under § 409(a) of ERISA. *Id.* With respect to the missing crucial element of congressional intent, the Court noted that " 'unless . . . congressional intent [to imply a private cause of action] can be inferred from the language of the statute, the statutory structure, or some other source, *the essential predicate for implication of a private remedy simply does not exist.*' " *Id.* (quoting *Northwest Airlines v. Transport Workers, Union of Am., AFL-CIO,* 451 U.S. 77, 94 (1981) (hereinafter "*Northwest Airlines*"))(emphasis added).

Rather than finding evidence of that essential predicate in ERISA, the Court found a "stark absence—in the statute itself and in its legislative history—of any reference to an intention to authorize the recovery of extra-contractual damages." *Id.* at 148. The Court further noted that "[t]he six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted * * * provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 146 (emphasis in original). The Court emphasized that " '[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a *comprehensive* legislative scheme including an integrated sys-

tem of procedures for enforcement.' " *Id.*, 473 U.S. at 134 (quoting *Northwest Airlines*, 451 U.S. at 97) (emphasis added).

The Court's decision in *Russell* therefore contained broad language which suggested that the Court might have found extra-contractual damages unavailable to plan participants under *any* remedial provision of ERISA. In particular, because the Court found *no* evidence in the statute or legislative history of ERISA to support judicially implied remedies of compensatory or punitive damages for plan participants, *Russell* indicated that future plan participants who asked the courts to imply such remedies would, at a minimum, be required to point to some legislative history or unique statutory feature that had previously escaped the Court's attention or " 'the essential predicate for implication of a private remedy' " would never be found. *Id.* at 145 (quoting *Northwest Airlines*, 451 U.S. at 94).

Nevertheless, the Court did stop short, in *Russell*, of finding that compensatory or punitive damages were unavailable to plan participants under *any* provision of ERISA. The Court limited the scope of its holding to the relief available under § 409(a), enforceable by plan participants pursuant to § 502(a)(2).

Building on its decision in *Russell*, this Court extensively analyzed ERISA's civil enforcement scheme and the legislative history behind it in *Pilot Life*. In *Pilot Life*, the Court abandoned the stated limitation of *Russell* and addressed its comments to § 502(a) as a whole. The respondent in *Pilot Life*, Dedeaux, sought " '[g]eneral damages for mental and emotional distress' " and " '[p]uni-

tive and exemplary damages' " under the Mississippi common law of bad faith against the ERISA plan in which he participated. 107 S. Ct. at 1551. In finding that Dedeaux's claims for compensatory and punitive damages were pre-empted by ERISA, this Court noted that "all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-regulated plans [are] treated as federal questions governed by § 502(a)." *Id.* at 1557.

The Court then stated that § 502(a) "set[s] forth a *comprehensive* civil enforcement scheme," *id.* at 1556 (emphasis added), and found that "Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the *exclusive* vehicle for actions by ERISA-plan participants and beneficiaries * * *." *Id.* at 1555 (emphasis added). The Court noted that under § 502 (a) a "plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits." *Id.* at 1556. The Court pointed out that "[a] participant or beneficiary may also bring a cause of action for breach of fiduciary duty, and under this cause of action may seek removal of the fiduciary." *Id.* (citing §§ 502(a)(2), 409). Finally, the Court noted that attorney's fees may be awarded to either party. *Id.* (citing § 502(g)).

The Court's discussion of the civil remedies available to plan participants under § 502(a) was notable for its

conspicuous failure to mention the availability of the extra-contractual compensatory or punitive damages Dedeaux sought. The Court cited ERISA's legislative history to the effect that Congress "'* * * intended that a body of Federal substantive law w[ould] be developed by the courts to deal with issues involving [ERISA] rights and obligations under private welfare and pension plans,'" *id.* at 1557-58 (quoting 109 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)), but highlighted two aspects of its *Russell* opinion in determining that Dedeaux's claims for damages due to emotional distress and punitive damages were pre-empted by ERISA: the Court will not imply a private right of action for extra-contractual damages where (1) "no express authority for [such] an award" is provided by statute, and (2) the extra-contractual remedy has been deliberately "omitted" from a "'*comprehensive* legislative scheme including an integrated system of procedures for enforcement.'" *Pilot Life,* 107 S. Ct. at 1556 (quoting *Russell,* 473 U.S. at 147) (emphasis added).

It is undisputed that § 502(a) provides no express authority for an award of compensatory or punitive damages to plan participants. *See* Petition at 14 (in which petitioner maintains that such remedies should be "implied"). *All* of § 502(a), not simply § 409(a), forms a "*comprehensive* civil enforcement scheme" that provides "exclusive" remedies to plan participants. *Pilot Life,* 107 S.Ct. at 1556, 1558. It therefore necessarily follows from the two *Russell* factors highlighted by the Court in *Pilot Life,* that the remedies petitioner seeks will *not* be implied

under any provision of § 502(a), including § 502(a)(3)(B). *Id.* at 1556.[6]

The Court went on to distinguish its holding in *Pilot Life* from that in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), in a way which makes doubly clear that *no* provision of § 502(a) provides for awards of compensatory or punitive damages to plan participants. The Court noted that in *Metropolitan v. Massachusetts* it had found that ERISA's express pre-emption provision saved from pre-emption "only state regulations *unrelated* to the substantive provisions of ERISA." *Pilot Life*, 107 S. Ct. at 1558 (emphasis added). The Court emphasized that the state regulation saved from pre-emption in *Metropolitan v. Massachusetts* "did not involve a state law *that conflicted with a substantive provision* of ERISA" while the Mississippi law of bad faith at issue in *Pilot Life*, which authorized awards of compensatory and puni-

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[6]All Circuit Courts of Appeals to decide whether extra-contractual compensatory or punitive damages are available to plan participants under ERISA have concluded similarly: *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (no compensatory or punitive damages available under § 502(a)(3)(B)); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters. Inc.*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, — U.S. —, 107 S. Ct. 884 (1987) (no punitive damages available under § 502(a)(3)(B)); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (same); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987) (same); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.) (*dicta*), *cert. denied*, 454 U.S. 968, *cert. denied*, 454 U.S. 1084 (1981) (no punitive damages available under ERISA); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) (no extra-contractual damages available under § 502(a)(3)(B)); *Bishop v. Osborn Transp.*, 838 F.2d 1173 (11th Cir. 1988), *petition for cert. filed* (May 16, 1988) (no punitive damages available under § 502(a)(3)(B)).

tive damages, *did* conflict with § 502(a). 107 S. Ct. at 1558 (emphasis added). Those remedies could not have "conflicted with" § 502(a) unless § 502(a) failed to authorize them. Petitioner's contention that this Court has not previously settled the question petitioner now raises is therefore in error: This Court concluded in *Pilot Life* that causes of action for compensatory or punitive damages brought by plan participants "conflict[] with" the substantive provisions of § 502(a) and are therefore unavailable to plan participants in civil ERISA actions.

C. Petitioner Wrongly Suggests that this Court Should Judicially Imply Remedies Under ERISA by Plucking Analogous Implied Remedies from the LMRA; Petitioner Must First Demonstrate that a Private Remedy Should Be Implied under ERISA by Performing the Cort v. Ash Analysis, Which Petitioner Has Failed to Do.

Petitioner wrongly suggests that in *Russell, Pilot Life* and *Taylor,* this Court announced that it had found support in the legislative history of ERISA for the proposition that the judiciary should imply, under ERISA, the same private rights of action for extra-contractual compensatory and punitive damages implied by the judiciary under § 301 of the LMRA. Petition, pp. 17, 19. Not only is petitioner's suggestion incomprehensible on its face (*see Russell,* 473 U.S. at 148, finding a "stark absence" of *any* such support in the statute and legislative history), but petitioner ignores the entire point of the *Russell* decision and the essential distinctions between § 301 of the LMRA and § 502(a) of ERISA, emphasized in *Pilot Life* and *Taylor.*

Before the Court will imply a private right of action under ERISA, the party seeking relief must first demonstrate that the *Cort v. Ash* test can be met. *Russell*, 473 U.S. at 145. If the Court could simply pluck implied remedies from the LMRA and apply them in the context of ERISA, it would not have been necessary to perform the *Cort v. Ash* analysis that *Russell* required. But the *Cort v. Ash* analysis must be performed. *Id.* Moreover, to overcome the stumbling blocks noted by the Court in *Russell*—the failure of the statutory structure or the legislative history of ERISA to support a private right of action for compensatory or punitive damages—petitioner must point to legislative history or statutory provisions which address the Court's prior objections. This, petitioner has failed to do.

To overcome the "stark absence" of legislative history supporting the private right of action petitioner claims, petitioner points to the decisions of this Court in which that "stark absence" was noted and explained. Petition at 17. That hardly demonstrates the intention of Congress to provide such remedies. Moreover, respondent has searched the legislative history of ERISA and has found no provision which supports petitioner's position.

Petitioner does point to one statutory feature which he claims supports his position. Petitioner maintains that declaratory and injunctive relief are available under other provisions of § 502(a). Petition at 29. Petitioner asks this Court to imply a private right of action for compensatory and punitive damages under § 502(a)(3)(B), which authorizes courts to afford "other appropriate equitable relief" under specified circumstances. In the case at bar,

the First Circuit, tracking the language of the Ninth Circuit, found that "'Congress used the word "equitable" [in § 502(a)(3)(B)] to mean what it usually means—injunctive or declaratory relief.'" (A17) (*quoting Sokol v. Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986)). Petitioner appears to maintain that the meaning given to "other appropriate equitable relief" by the First Circuit renders the word "other" "redundant," Petition at 29, because the "appropriate equitable relief" envisioned by the First Circuit is merely duplicative of relief available elsewhere, although the "where" is never identified by petitioner. Petitioner maintains that "[t]he word 'other' [should therefore be] give[n] a meaning more consistent with the creation of implied remedies analogous to those created by the courts under the LMRA." *Id.*

It is difficult to discern how the word "other" in § 502(a)(3)(B) can be read to create "implied remedies analogous to those available in LMRA actions." Petitioner points to no support in the statute or legislative history for such a requirement, nor does respondent know of any.

Furthermore, the construction given to "other" by the Court of Appeals does not render the relief provided by § 502(a)(3)(B) "redundant." For example, section 502(a)(3)(A) permits a "participant . . . to enjoin any act or practice which *violates* any provision of this subchapter or the terms of the plan." (Emphasis added). Section 502(a)(3)(B), on the other hand, authorizes a participant "to obtain other appropriate equitable relief (i) *to redress* such violations or (ii) *to enforce* any provisions of this subchapter or the terms of the plan." (Emphasis added). The former—§ 502(a)(3)(A)—permits injunctions against acts or practices which actually "violate"

ERISA or plan terms. But there may be many acts or practices which fall short of ERISA or plan violations which, unless enjoined, would *lead* to such violations or cause a deprivation of ERISA rights. The latter—§ 502 (a)(3)(B)—authorizes a court to provide the "appropriate equitable relief" necessary to "*redress*" such violations and "*enforce*" ERISA or plan terms. The relief available under § 502(a)(3)(B), unlike the injunctive relief afforded by § 502(a)(3)(A), is *not* limited to injunctions against actual ERISA or plan *violations*. Consequently, the "*other* appropriate equitable relief" afforded by § 502(a)(3)(B), though declaratory or injunctive in nature, is not simply "redundant," as petitioner suggests.[7] The single statutory feature to which petitioner points

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[7]As noted by the Ninth Circuit, the Senate Finance Committee defined "appropriate equitable relief" in the context of ERISA as follows:

> Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries. Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary or participants or beneficiaries if he has violated any of the specified fiduciary obligations * * * . It is expected that a fiduciary * * * may be removed for repeated or substantial violations of his responsibilities, and that upon removal the court may, in its discretion, appoint someone to serve until a fiduciary is properly chosen in accordance with the plan.

Sokol v. Bernstein, 803 F.2d at 537-38 (quoting S. Rep. No. 383, 93d Cong., 2d Sess, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4989). The Ninth Circuit concluded that "to add an extra-contractual remedy to a list of remedies so strongly contractual in nature would be to step beyond the province of the judiciary and into that of the legislature." *Sokol v. Bernstein*, 803 F.2d at 538.

therefore fails to overcome the *Cort v. Ash* stumbling blocks noted by the Court in *Russell*. It fails even to support petitioner's contention that the decision of the Court of Appeals renders § 502(a)(3)(B) "redundant," much less to address petitioner's larger unstated *non sequitor*: that in order to give meaning to the phrase "other appropriate *equitable* relief," Congress intended this Court to imply *extra-contractual* remedies, which petitioner has failed to establish *are* "equitable."

Petitioner's argument also overlooks the obvious distinction between § 301 of the LMRA, under which private rights of action have been implied, and § 502(a) of ERISA. In the process, petitioner misconstrues this Court's decisions in *Pilot Life* and *Taylor*, which set forth the basis for that distinction. Unlike § 502(a) of ERISA, section 301 of the LMRA sets forth no remedial "scheme," detailing specific remedies that specified individuals may seek; rather, it primarily contains jurisdictional, venue, and service provisions. By contrast, § 502(a) of ERISA states on its face that individual plan participants may bring civil actions to obtain any of the specified relief set forth in a remedial "scheme" this Court found "comprehensive" and "exclusive." *Pilot Life*, 107 S. Ct. at 1555, 1556, 1557, 1558; *Taylor*, 107 S. Ct. at 1546. It was ERISA's very comprehensiveness that led the Court to reiterate in *Pilot Life* that " ' " [t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." ' " *Id.* at 1556 (quoting *Russell*, 473 U.S. at 134). That comprehensiveness, so different from the bare bones provisions of § 301 of the LMRA, left the Court " 'reluc-

tant to tamper with an enforcement scheme crafted with such evident care *as the one in ERISA.*' " *Pilot Life,* 107 S. Ct. at 1556 (quoting *Russell,* 473 U.S. at 146) (emphasis added). Petitioner's ill-conceived reference to the LMRA provides no basis for reevaluating the Court's prior reluctance.

2. Petitioner Raises a Question of Fact, Not an Important Question of Law.

Petitioner maintains that this Court should grant a writ of *certiorari* to determine whether compensatory and punitive damages are available under § 502(a)(3)(B) for violations of § 510, "Interference with Rights Protected under Act." Petition at 17-18, 24. Nowhere in the "Reasons for Granting Writ" does petitioner explicitly state how the alleged interference occurred in the instant case, nor does petitioner identify the "rights protected" by the Act that allegedly have been violated by respondent. Instead, petitioner begins his discussion of those alleged violations by stating "[p]etitioner's argument *in the Court of Appeals* was that * * * [respondent] inten[ded] * * * to coerce petitioner's resignation or dismissal due to his medical inability to work, and thereby save money under the Metropolitan funded plan through the prospective forfeiture of all employee benefits including retirement." Petition at 17-19 (emphasis added).

Petitioner is vague about the rights respondent allegedly interfered with because petitioner is attempting to revive a factual dispute, disposed of below. By Count I of his Complaint—the only claim which petitioner pursues before this Court—petitioner alleges that respondent, by advising petitioner of its decision to terminate his disability status effective May 1, 1983, "attempt[ed] * * *

to constructively discharge [petitioner] *in order to interfere with his attainment of his vested right to retirement* some 2½ years hence." Compl. at ¶ 20 (emphasis added). Petitioner maintains in his complaint that respondent's sole motivation for interfering with his rights was "to satisfy and serve it[s] own interest in mimimizing the company's expense for [petitioner's] *retirement benefits* * * * ." *Id.* at ¶ 21 (emphasis added). In the Petition, petitioner asserts that "[w]ithin two or three years [of the] events [here in question] petitioner's retirement benefits would have vested absolutely." Petition at 8.

The Court of Appeals noted that respondent's "retirement benefits are uncontested" and that respondent "took early retirement effective October 1, 1985." (A8). More significantly, it was unrebutted below that petitioner's retirement benefits had fully vested *prior* to May 1, 1983, the date on which the events here in question took place, so that no act of respondent could possibly have interfered with petitioner's attainment of those protected rights.[8] No civil action for violation of § 510 can be maintained if the rights allegedly interfered with have already vested. *Corum v. Farm Credit Servs.*, 628 F. Supp. 707 (D. Minn. 1986); *Donohue v. Custom Management Corp.*, 634 F. Supp. 1190 (W.D. Pa. 1986). Petitioner's baseless assertion in the Petition that his retirement benefits would have "vested absolutely" "within two or three years" from the actions complained of is merely an effort,

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[8]There was also no evidence below to support the proposition that petitioner *would* have been discharged if he had not returned to work on May 3, 1983. To the contrary, the record indicated that petitioner had been given an opportunity to submit information that rebutted respondent's determination to discontinue disability benefits after April 30, 1983. (A7). Petitioner supplied no such information. (A7).

by petitioner, to revive a factual allegation for which he supplied no support below.

3. Because of the Facts of This Case, Petitioner Is Not the Proper Party to Raise the Question at Issue, Even if It Is Important.

Finally, even assuming that the availability of compensatory or punitive damages to plan participants under the "other appropriate equitable relief" language of § 502 (a)(3)(B) presents an important question not previously settled by this Court, petitioner is not the proper party to raise it. Petitioner does not maintain that respondent *did* interfere with protected ERISA rights, but that respondent *attempted* to interfere with them. Assuming *arguendo* that petitioner's factual allegations are correct —and they are not—ERISA enabled him to obtain "appropriate equitable relief" as soon as he suspected such attempted interference—that is, as soon as he learned of respondent's determination to discontinue his disability benefits. Petitioner was *not*, as he maintains, "forc[ed]" to choose between "return[ing] to work or forfeit[ing] all employee benefits." Petition at 17. ERISA allowed him to go to Court *at once* and enjoin respondent from interfering with his protected rights, assuming that exhaustion of other available remedies was not required. If petitioner *had* other remedies available to him—and he did—then, at a minimum, petitioner should have exhausted *them*. Petitioner could have submitted factual information to respondent which rebutted respondent's determination to discontinue his disability benefits. (A7). Petitioner simply chose not to. (A7, A12).

Having failed to avail himself of the express remedies provided to him by ERISA, petitioner now asks this Court to *imply* judicial remedies not explicitly authorized by statute. Respondent submits that where, as here, petitioner has failed to take advantage of the express remedies ERISA provides, and those remedies, if utilized, could have prevented the suffering and emotional distress petitioner alleges, an award of compensatory and punitive damages would be *in*appropriate, even if such damages could, in theory, be awarded to plan participants under § 502(a)(3)(B) in "appropriate" cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Counsel for Respondent

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(On the Brief)
One Madison Avenue
New York, New York 10010

Dated: New York, New York
September 26, 1988

APPENDIX

United States Court of Appeals
for the First Circuit

No. 87-1533

RICHARD DRINKWATER,

Plaintiffs, Appellants,

v.

METROPOLITAN LIFE INSURANCE CO.,

Defendant, Appellee.

JUDGMENT

Entered: May 18, 1988

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Sigliano

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Clerk.

[cc: Messrs. Holian and Toppeta]

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES OF METROPOLITAN LIFE INSURANCE COMPANY, PURSUANT TO RULE 28.1

Metropolitan Life Insurance Company

Metropolitan Tower Corp.

Metropolitan Life Holdings Limited

Metropolitan Asset Management Corporation

Metropolitan Insurance and Annuity Company

Century 21 Real Estate Corporation

State Street Research and Management Company

Management and Risk Institute Inc.

Metropolitan Life Insurance Company of Illinois

Warwick Insurance Agency, Inc.

Metropolitan Realty Management, Inc.

Metropolitan Insurance Company (Bermuda) Ltd.

MetLife Capital Holdings, Inc.

MetLife General Insurance Agency, Inc.

Transmountain Land & Livestock Company

MetLife Capital Corporation

Metropolitan Tower Realty Company, Inc.

Metropolitan Tower Life Insurance Company

One Madison Avenue Corp.

Metropolitan Reinsurance Company

Metropolitan Property and Liability Insurance Company

Centennial Equities Corporation

Metropolitan Reinsurance Company (U.K.) Limited

Metropolitan General Insurance Company

State Street Fund for Foundations and Endowments

MetLife State Street Investment Services, Inc.

DTSS Incorporated

Nebraska Farms, Inc.

MetLife (UK) Limited

Metropolitan Casualty Insurance Company

200 Park Avenue, Inc.

MetLife Securities, Inc.

Marketforce International Insurance Company

640 Fifth Avenue, Inc.

MetLife Security Insurance Company of Louisiana

MetLife Capital, Limited Partnership

Corporate Health Strategies, Inc.

MetLife Holdings, Inc.

MetLife HealthCare Management Corporation

Edison Supply and Distribution, Inc.

MetLife Funding, Inc.

MetLife Security Insurance Company

Albany Life Assurance Company Limited

Doubletree, Inc.

Horsco Corporation

Metropolitan Life Insurance Company of Canada

Future Focus Health Systems Limited

Albany Pension Managers and Trustees Limited

Morguard Resources Limited

Albany Home Loans Limited

MetLife HealthCare Network of Northern California, Inc.

MetLife HealthCare Network of Kansas City, Inc.

Management Associates, Inc.

First General Insurance Company

Cross & Brown Company

MetLife Capital Credit Corporation

MetLife Marketing Corporation

MetLife Credit Corp.

Metropolitan Life Financial Services Limited

MetLife Security Insurance Company of New York

Albany Life Group Services Limited

Innco Corporation

Comprise Hotel Corporation

Metropolitan Insurance Company

Morguard Group Limited

Albany General Insurance Company Limited

Morguard Investments Limited

Morguard Trust Company

MetLife HealthCare Network of Georgia, Inc.

MetFirst Financial Co.

2154 Trading Corporation

MetLife HealthCare Network of Southern California, Inc.

MetLife HealthCare Network of Northern New Jersey, Inc.

Farmers National Company

Preferred Providers Insurance Company of America

Met West Agribusiness, Inc.

MCC Alpha Corp.

MetLife HealthCare Network of Indiana, Inc.

Western Conveyancing Corp.

MetLife HealthCare Network of South Florida, Inc.

MetLife HealthCare Network of Cincinnati, Inc.

Metmore Financial, Inc. (Del.)

MetLife Healthcare Network of Massachusetts, Inc.

Metimore Insurance Agency, Inc.

MetLife HealthCare Network of Texas, Inc.

Southern Health Plan Management, Inc.

Healthcare Network, Inc.

Cross & Brown Company of New Jersey, Inc.

Century 21 of Missouri, Inc.

MCCC Beta Corp.

MetLife HealthCare Network of Illinois, Inc.

MetFirst Insurance Agency, Inc.

MetLife HealthCare Network of Colorado, Inc.

MetLife HealthCare Network of New York, Inc.

Metmore Financial, (Cal.)

MetLife HealthCare Network of Florida, Inc.

MetLife HealthCare Network, Inc.

Egagtrom Corporation

MetLife Healthcare Network Kentucky, Inc.

Metimor Property Management Inc. (Del.)

MetLife HealthCare Network Northeast Florida, Inc.

MetLife HealthCare Network of Columbus, Inc.

MetLife Healthcare Network of Tampa Bay, Inc.

MetLife HealthCare Network of Wisconsin, Inc.

MetLife HealthCare Network of Rhode Island, Inc.

Cross & Brown of Connecticut, Inc.

Century 21 of Michigan, Inc.

Century 21 of the Pacific, Inc.

Cross & Brown Construction Corporation

Century 21 of the Northeast Inc.

Century 21 Real Estate of Northern California, Inc.

CroBro Realty Corp.

Century 21 Real Estate Franchising Corporation of New York

Cross & Brown Associates of New Jersey, Inc.

Century 21 Insurance Services Corporation

Century 21 Real Estate of the South, Inc.

Certified Building Maintenance Corp.

Century 21 of the Southeast, Inc.

Cross & Brown Company of Missouri, Inc.

Century 21 Real Estate of Northern Texas, Oklahoma and Arkansas, Inc.

Century 21 Real Estate North Central States, Inc.

Century 21 Real Estate Corporation of Northern Illinois

DT Investments, Inc.

DTI Realty, Inc.

Doubletree Hotel Ventures, Inc.

Doubletree, Inc. of California

Doubletree of Houston, Inc.

Cross & Brown Company of Florida, Inc.

Century 21 of Ohio, Inc.

Cross & Brown Associates of New York, Inc.

Century 21 Mortgage Corp.

Century 21 of Texas, Inc.

Cross & Brown Company of Maryland, Inc.

Century 21 of New England, Inc.

Cross & Brown Residentials, Inc.

Century 21 Real Estate of the Midwest, Inc.

Century 21 Real Estate of Mississippi, Inc.

Cross & Brown Company of Georgia, Inc.

Century Securities Corp.

Century 21 Real Estate Corporation of San Diego County

Century 21 Real Estate of the Carolinas, Inc.

DTM New Orleans, Inc.

DTM Orange, Inc.

DTM Park West, Inc.

DTM Pasadena, Inc.

DTM St. Louis, Inc.

Greenville Doubletree, Inc.

INN Properties, Inc.

Moondance, Inc.

North Central Hotel Co., Inc.

Osborn Doubletree, Inc.

Randolph House, Inc.

Scottsdale Plaza Doubletree, Inc.

Tree Inns, Inc.

Tucson Doubletree Plaza, Inc.

Tuk Inns, Inc.

DTM Albuquerque, Inc.

DTM Anchorage, Inc.

DTM Atlanta, Inc.

DTM Boulder, Inc.

DTM Cupertino, Inc.

DTM Houston, Inc.

DTM Mission Valley, Inc.

DTM Salt Lake City, Inc.

DTM Santa Clara, Inc.

DTM Tampa, Inc.

DTM Tucson, Inc.

DTM Tulsa, Inc.

DTM Vail, Inc.

DTM Walnut Creek, Inc.

DTR Atlanta, Inc.

DTR Cupertino, Inc.

DTR Denver, Inc.

DTR Kansas, Inc.

DTR Salt Lake City, Inc.

DTR Santa Clara Inc.

Rodeway Inns of the Southwest, Inc.

Southwest Motels, Inc.

DTM Kansas, Inc.

Compri Hotel Systems, Inc.

Compri Management Corporation No. 1

Compri Management Corporation No. 2

Compri Management Corporation No. 3

Compri Management Corporation No. 4

Compri Management Corporation No. 5

Compri Management Corporation No. 6

Compri Management Corporation No. 7

Compri Management Corporation No. 8

Compri Management Corporation No. 9

Compri Management Corporation No. 10

Compri Management Corporation No. 11

Compri Management Corporation No. 12

Compri Management Corporation No. 13

Compri Realty Corporation No. 1

Compri Realty Corporation No. 2

Compri Realty Corporation No. 3

Compri Realty Corporation No. 4

Compri Realty Corporation No. 5

Compri Realty Corporation No. 6

Compri Realty Corporation No. 7

Compri Realty Corporation No. 8

Compri Realty Corporation No. 9

Compri Realty Corporation No. 10

Compri Realty Corporation No. 11

Compri Realty Corporation No. 12

Compri Realty Corporation No. 13

Compri Realty Corporation No. 99

Compri Management Corporation A

Compri Management Corporation B

Compri Management Corporation C

Compri Management Corporation D

Compri Management Corporation E

Compri Management Corporation F

Compri Management Corporation G

Compri Management Corporation H

Compri Management Corporation I

Compri Management Corporation J

Compri Management Corporation K

Compri Management Corporation L

MCCC Corp.